



February 19, 2002

Ms. Tamara Pitts
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2002-0801

Dear Ms. Pitts:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158074.

The City of Fort Worth (the "city") received a request for information related to the Texas Commission on Human Rights Charge No. 31A98256 and/or Mr. Scally. The requestor states that he is representing a party in a lawsuit styled *B. Tom Scally v. Burlington Northern Santa Fe Railroad* and filed in the United States District Court, Northern District of Texas, Fort Worth Division. You state that the responsive information is a record of the Fort Worth Human Relations Commission ("FWHRC"). You claim that "the settlement statement" and medical documents are excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 21.303, 21.304, and 21.305 of the Texas Labor Code, sections 327.9 and 327.10 of title 40 of the Texas Administrative Code, as well as sections 159.002 and 159.005 of the Texas Occupations Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address the timeliness of your request for a decision. Subsections 552.301(a) and (b) provide:

- (a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.
- (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the department received the request for information on October 26, 2001. You did not request a decision from this office until November 20, 2001. *See* Gov't Code §552.308. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). A compelling reason to withhold the information from the public is demonstrated where information is made confidential by other law, or where third party interests are at issue. Open Record Decision No. 150 (1977). The applicability of section 552.101 is such a compelling reason.¹

You assert that certain medical information contained in Exhibit "D" is confidential and must be withheld from the requestor. Exhibit "D" contains medical records that are subject to section 159.002 of the Occupations Code, known as the Medical Practice Act ("MPA"), in conjunction with section 552.101 of the Government Code. Section 552.101 encompasses confidentiality provisions such as the MPA. The MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). The records in Exhibit "D" which we have marked are confidential and the city may release those records only in accordance with the MPA.

You inform us that the FWHRC was created pursuant to title 21 of the Labor Code. *See* Labor Code § 21.152 (providing for the creation of local commissions). You explain that the Texas Commission on Human Rights (the "Commission") has deferred jurisdiction to

¹Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

hear complaints to the FWHRC. *See* Labor Code §21.154; *see also* 40 T.A.C. §325.4 (authorizing cooperative agreements between Commission and local commissions). The city has a “Worksharing Agreement” between the FWHRC and the Equal Employment and Opportunity Commission. The city also has a “Cooperative Agreement” between the Commission and the FWHRC. The FWHRC is a local agency authorized by sections 21.152 of the Labor Code to investigate complaints, as provided by section 21.204 of the Labor Code. Section 21.204 relates to investigations by the Commission. You claim that sections 21.303, 21.304, and 21.305 of the Labor Code except the requested information from disclosure.

Section 21.304 of the Labor Code concerns the release of Commission information to the public and provides as follows:

An officer or employee of the commission may not disclose to the public information obtained by the commission under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Section 327.10 of title 40 also governs the public’s access to commission records.²

However, in this case, we understand that the requestor represents a party to a complaint filed under section 21.201 of the Labor Code. Section 21.305 of the Labor Code concerns the release of commission records to a party to a complaint filed under section 21.201 and provides:

²Section 327.10 provides as follows:

(a) No officer or employee of the commission may make public any information obtained by the commission under its authority under the §§Texas Labor Code, 21.201-21.207 (formerly §Texas Revised Civil Statutes Annotated Article 5221k, 6.01), except as necessary to the conduct of a proceeding under this Act.

(b) No commissioner or employee of the commission may make public, without the written consent of the complainant and respondent, information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, alternative dispute resolution, conciliation, or persuasion, whether or not there is a determination of reasonable cause.

Although you did not raise section 21.201(b) of the Labor Code, this provision is similar to the rule you raise regarding the public’s access to commission records. Section 21.207(b) reads as follows:

(b) Without the written consent of the complainant and respondent, the commission, its executive director, or its other officers or employees may not disclose to the public information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, conciliation, or persuasion, regardless of whether there is a determination of reasonable cause.

(a) The commission shall adopt rules allowing a party to a complaint filed under Section 21.201 reasonable access to commission records relating to the complaint.

(b) Unless the complaint is resolved through a voluntary settlement or conciliation, on the written request of a party the executive director shall allow the party access to the commission records:

(1) after the final action of the commission; or

(2) if a civil action relating to the complaint is filed in federal court alleging a violation of federal law.

The Commission has adopted rules governing access to commission records by a party to a complaint at Title 40 of the Texas Administrative Code section 327.9. This provision provides:

Pursuant to the limitations established by the §§Texas Labor Code, 21.304-21.305 (formerly §Texas Revised Civil Statutes Annotated Article 5221k, 8.02(a)), the executive director shall, on written request of a party to a complaint filed under the §Texas Labor Code, 21.201 (formerly §Texas Revised Civil Statutes Annotated Article 5221k, 6.01(a)), allow the party access to the commission's records, unless the complaint has been resolved through a voluntary settlement or conciliation agreement, if:

(1) following the final action of the commission, a party to the complaint or the party's attorney certifies in writing that a civil action is to be filed under the Act within 60 days from the date of receipt of the commission's notice of right to file a civil action or a civil action under the Act is pending in state court; or

(2) a party to the complaint or the party's attorney certifies in writing that a civil action relating to the complaint is pending in federal court alleging a violation of federal law.

In this case, you seek to withhold only the highlighted information in Exhibit C. Consequently, we believe that you have determined that the requestor is an attorney who has certified in writing that he represents a party in a civil action which is pending in federal court. You do not inform us that the complaint was resolved through a voluntary settlement or conciliation agreement. Accordingly, section 21.305 of the Labor Code and section 327.9 of title 40 of the Texas Administrative Code require the FWHRC to grant the requestor access to the highlighted information. A release to a party under these provisions is not

inconsistent with the prohibition on release of information to the public found in section 21.207 of the Labor Code and section 327.10 of the rules. Such a release is not a release to the public under the Act. *See* Open Records Decision No. 534 at 7 (1989).

We note, however, that Exhibit "D" contains information subject to section 552.101 of the Government Code in conjunction with the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have marked portions of Exhibit "D" which the city must withhold under section 552.101 in conjunction with the common law right to privacy.

Exhibit "D" also contains a social security number. A social security number is excepted from required public disclosure under section 552.101 of the Act in conjunction with 1990 amendments to the federal Social Security Act, 42 United States Code section 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, the city may release the marked medical records in Exhibit "D" only in accordance with the MPA. The city must withhold the marked private information in Exhibit "D," pursuant to section 552.101 in conjunction with common law privacy. The social security number in Exhibit "D" must be withheld if it was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990. The remainder of the responsive information must be released to this requestor in its entirety pursuant to section 552.101 in conjunction with section 21.305 of the Labor Code and section 327.9 of the Texas Administrative Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

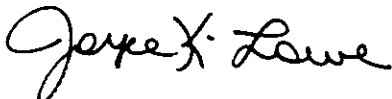
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Joyce K. Lowe".

Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 158074

Enc: Submitted documents

c: Mr. Kent R. Smith
Jackson Walker
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(w/o enclosures)